NOTE

Filling in the Gap: Using the Common Law Tort of Wrongful Discharge in Violation of Public Policy to Strengthen Protections for Health and Safety Whistleblowers

Shawn Ali*

Table of Contents

---

* Georgetown University Law Center, J.D. 2026; Emory University, B.A. 2021. This Note was drafted as a supervised research project under the supervision of Professor David Vladeck whose help and guidance throughout this process has been greatly appreciated. If not for Professor Vladeck having told me of the supervised research option at Georgetown, I do not know that this Note would have been written. I am also indebted to the fantastic Editors of *The Georgetown Law Journal*. I was consistently impressed with the depth and quality of the work they put in to ensure this piece became the best it could be.

INTRODUCTION

Catherine Coward had been working as a registered nurse in the adult psychiatric ward of MCG Health in Georgia for eight years.[1] One night while she was working, a patient attempted suicide.[2] In the aftermath of the suicide attempt, management required the employees on staff at the time, including Coward, to give statements so that they could understand what had gone wrong in their procedures.[3] Coward responded candidly to management; she told her supervisor that the suicide attempt was only possible because of severe understaffing.[4] For her honesty in the wake of this near tragedy, MCG fired Coward.[5] Although Georgia has a whistleblower statute,[6] Coward's statutory whistleblower claim did not survive summary judgment.[7]

Unfortunately, Coward's experience is commonplace. A few hundred miles away, Barbara Blackburn, a dental assistant, and Heather Esposito, a dental hygienist, worked for American Dental Centers (ADC) in Ohio.[8] During the course of their employment, they became aware of serious misconduct by Sherman Allen, a dentist also employed by ADC.[9] Allen would frequently show up to work hungover and possibly on drugs.[10] He seriously injured a patient who was under anesthesia by striking their nerve, he dropped a drill on a patient, and he

1. Coward v. MCG Health, Inc., 802 S.E.2d 396, 397–98 (Ga. Ct. App. 2017).
2. *Id.* at 398.
3. *See id.*
4. *Id.*
5. *Id.*
6. *See* GA. CODE ANN. § 45-1-4.
7. *Coward*, 802 S.E.2d at 401.
8. Blackburn v. Am. Dental Ctrs., No. 10AP–958, 2011 WL 5825391, at *1 (Ohio Ct. App. Nov. 17, 2011).
9. *Id.*
10. *Id.* at *8.

even brought strippers to the office.[11] This behavior would be a problem in a typical white-collar workplace, but in a dental office, where lives can often be at stake, Allen's conduct was truly reprehensible.[12] Blackburn and Esposito, concerned for the wellbeing of the patients in their charge, reported their misgivings about Allen to ADC.[13] For their honesty in warning their employers of the danger that Allen posed to ADC's patients, ADC fired Esposito and allegedly fired Blackburn.[14] Despite the fact that Ohio has a whistleblower statute,[15] Blackburn and Esposito's statutory whistleblower claim did not survive summary judgment.[16]

These cases are similar in several respects. The plaintiffs in both cases (i) had concerns about the health and safety of their workplace, (ii) shared those concerns with their superiors, (iii) were fired for sharing those concerns, and (iv) were unable to recover under their states' respective whistleblower statutes.

The legal justification for their inability to recover under their states' whistleblower statutes was also the same; the conduct they reported was not illegal.[17] The vast majority of state whistleblower statutes, and Georgia and Ohio are no exception, require either the reported conduct to be illegal or for the whistleblower to have had a reasonable belief that the conduct was illegal.[18] In *Coward v. MCG Health, Inc.*, the court made clear that there was no law in Georgia that made understaffing a crime.[19] The court instead described the pervasive understaffing that allegedly led to an attempted suicide as "internal policy," which meant that Georgia's whistleblower statute could not protect Coward.[20] Similarly, the court in *Blackburn v. American Dental Centers* noted that the Ohio whistleblower statute requires a "criminal offense," and in the court's view, nothing in Blackburn and Esposito's report about Allen rose to the level of criminality.[21] But there is one significant difference between these cases: although Blackburn and Esposito could not proceed under their state's whistleblower statute, their common law claim for wrongful discharge in violation of public policy (the "public policy exception")[22] did survive

11. *Id.* at *6.

12. Shockingly, this behavior was not considered illegal. *See id.*

13. *See id.* at *1.

14. *Id.* at *1.

15. *See* OHIO REV. CODE ANN. § 4113.52.

16. *See Blackburn*, 2011 WL 5825391, at *1, 10, 13.

17. Nurse understaffing by itself is not usually illegal. Instead, it is the negligence that flows from that understaffing that is typically actionable. *See, e.g.*, Charlene Harrington & Toby S. Edelman, *Failure to Meet Nurse Staffing Standards: A Litigation Case Study of a Large US Nursing Home Chain*, INQUIRY, 2018, at 1, 9. Some jurisdictions, however, mandate particular nurse-to-patient ratios that make understaffing illegal even without any adverse effects on patients. *See* CAL. CODE REGS. tit. 22, § 70217(a).

18. Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 588–89 (1999).

19. 802 S.E.2d 396, 400 (Ga. Ct. App. 2017).

20. *Id.*

21. *Blackburn*, 2011 WL 5825391, at *6–7.

22. The alternative name for wrongful discharge in violation of public policy is the "public policy exception" because the doctrine serves as an exception to the virtually universal doctrine of employment-at-will. *See* Elletta Sangrey Callahan, *The Public Policy Exception to the Employment at*

summary judgment,[23] while Coward's case could not proceed because Georgia does not recognize the tort.[24]

But unlike Blackburn and Esposito, many plaintiffs who bring whistleblower complaints under the common law public policy exception cannot survive summary judgment because courts often construe what counts as "public policy" narrowly.[25] The same problem Coward faced in her whistleblower complaint is therefore replicated in the common law when courts refuse to protect whistleblowers unless there is a statute or constitutional provision specifically proscribing the complained-of conduct.[26] But if the conduct was statutorily proscribed, the plaintiff could usually just recover under their state's general purpose whistleblower statute, which almost all states possess.[27] This redundancy renders the common law sorely inadequate in protecting many well-meaning whistleblowers.[28]

Despite the problems created by courts' narrow interpretations of the exception, this Note will argue that the public policy exception, properly construed, should cover all internal whistleblower complaints that raise concerns relating to public health or safety. Public health and safety are important enough that internal reporting should be universally protected. Part I of this Note will briefly describe both the history and the current landscape of American employment law. Part II will discuss the rise of the public policy exception, how it is interpreted by courts, and how that interpretation fails to adequately protect employees. Parts III and IV will discuss whistleblower statutes, with Part III focusing on federal whistleblower statutes and Part IV focusing on state whistleblower statutes. Part V will discuss *Gardner v. Loomis Armored Inc.*[29] and *Danny v. Laidlaw Transit Services, Inc.*,[30] cases that demonstrate how the public policy exception could be expanded to universally protect internal health-related whistleblowers. Finally, Part VI will argue, based on the logic of *Gardner* and *Danny*, that the public policy exception should be applied to provide universal protection for internal whistleblowers so long as whistleblower complaints are made internally and are based on health and safety concerns. To conclude, this Note proposes a modified test for courts to apply when employees are discharged for raising public health and safety concerns.

Will Rule Comes of Age: A Proposed Framework for Analysis, 29 AM. BUS. L.J. 481, 481–82, 485 (1991).

23. *See* Blackburn v. Am. Dental Ctrs., 22 N.E.3d 1149, 1155, 1159 (Ohio Ct. App. 2014); Blackburn v. Am. Dental Ctrs., No. 08CV0100230, 2015 WL 12747763, at *1 (Ohio C.P. Franklin Cnty. May 19, 2015).

24. *See* Fink v. Dodd, 649 S.E.2d 359, 362 & n.8 (Ga. Ct. App. 2007).

25. *See* Margiotta v. Christian Hosp. Ne. Nw., 315 S.W.3d 342, 348 (Mo. 2010) (en banc).

26. *See* Wright v. Shriners Hosp. for Crippled Child., 589 N.E.2d 1241, 1244–45 (Mass. 1992).

27. *See* Frank J. Cavico, *Private Sector Whistleblowing and the Employment-at-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 549–50, 556 (2004); Vaughn, *supra* note 18, at 588.

28. *See* William R. Corbett, *"You're Fired!": The Common Law Should Respond with the Refashioned Tort of Abusive Discharge*, 41 BERKELEY J. EMP. & LAB. L. 63, 78 (2020).

29. 913 P.2d 377 (Wash. 1996).

30. 193 P.3d 128 (Wash. 2008).

I. AMERICAN EMPLOYMENT LAW

Part I begins by discussing the foundations of employment-at-will, the almost universal employment relationship in the United States. This background is necessary to understand why increased protections for workers are necessary. After this brief discussion, this Part will discuss how legislatures and courts have responded to the unfairness inherent in the at-will relationship.

A. FOUNDATIONS OF EMPLOYMENT-AT-WILL

The United States is unique among industrialized societies in its adherence to the doctrine of employment-at-will.[31] In its pure form, employment-at-will means that, absent a contractual provision to the contrary, an employee can be fired without notice, at any time, and for no reason.[32] The employer's right to fire finds its reflection in an employee's right to quit without notice, at any time, and for no reason.[33] Forty-nine states, Montana excluded, adhere to the doctrine, making at-will employment a near-universal reality in the American workplace.[34]

The effects of the at-will presumption for the American working class cannot be overstated. Because its prominence means that almost all American workers can be fired at any time without much legal recourse, most American workers live lives of relative precarity. Additionally, many American workers believe themselves to have more protection from arbitrary discharge than they actually have, leading to a false sense of security in the workplace.[35] Defenders of the at-will presumption argue that, despite seeming inequitable, employment-at-will's reciprocity ensures fairness and efficiency.[36] They contend that an employer's prerogative to discharge is balanced by an employee's prerogative to quit, giving both sides the flexibility to act in their own interests.[37]

This highly idealized view of employment relations mistakes symmetry for fairness and ignores the reality of most workers' lives.[38] Many Americans live paycheck to paycheck, and those who do not are not far behind.[39] Accordingly,

---

31. *See* Cynthia Estlund, *Employment-at-Will: Too Simple for a Complex World*, 10 TEX. A&M L. REV. 403, 403 (2023).

32. *Id.*; Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000).

33. Estlund, *supra* note 31, at 406.

34. In 1987, Montana became the notable exception to the previously universal at-will presumption when it passed the Wrongful Discharge from Employment Act. *See* Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA)*, 57 MONT. L. REV. 375, 376 (1996). Whether this statute has made a significant difference for employees in Montana is subject to debate. *See id.* at 421.

35. *See* Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 7 (2002).

36. *See generally* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

37. *See id.* at 947–48, 954.

38. *See* Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).

39. Kamaron McNair, *Nearly Half of Americans Say They Live Paycheck to Paycheck*, CNBC: MAKE IT (Nov. 19, 2024, at 14:06 ET), https://www.cnbc.com/2024/11/19/bank-of-america-nearly-half-of-americans-live-paycheck-to-paycheck.html [https://perma.cc/LNW9-RCHE].

whatever flexibility proponents of an at-will presumption believe workers possess in an idealized world is made moot by the weak economic position many workers find themselves in. The problem is only compounded by the decline of unions, whose collective bargaining agreements once provided many American workers with just-cause protections from discharge.[40] Now, with union density being at an all-time low,[41] many workers who once would have had the just-cause protections unions provide are instead faced with the vagaries of market forces and employer caprice. American workers are still living in the aftermath of this decline, despite some hopeful signs of a tide shift.[42] Lastly, it should be noted that these problems primarily arise in private sector employment; public sector employees tend to have much stronger employment protections.[43]

B. LEGISLATIVE INTERVENTIONS AND COMMON LAW RESPONSES

Beginning in the mid-twentieth century, in response to the blatant unfairness that the pure form of employment-at-will entails, both legislatures and courts began to push back. In Congress, numerous laws abrogating the employer's previously universal right to discharge were passed. First came Title VII of the Civil Rights Act of 1964, which makes it illegal to make employment decisions based upon an individual's race, color, religion, sex, or national origin.[44] In the years following 1964, additional statutes have been passed that similarly restrict the employer's ability to fire employees on grounds such as age,[45] disability,[46] and whistleblowing.[47]

Despite their reluctance to appear to legislate from the bench,[48] courts have nonetheless helped ameliorate the doctrine's more severe implications. One common law exception that was common during the expansion of employment rights in the 1970s and 1980s, but lost judicial favor in the 1990s, is that of the implied-in-fact contract.[49] Under the implied-in-fact contract exception, courts will find an implied promise of continued employment by looking at factors such as employee manuals, length of service, verbal assurances, and the company's personnel policies.[50] Although this theory of recovery initially showed promise, courts

40. *See* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410 & n.33 (1967).

41. Michael S. Derby, *US Labor Union Membership Slips in 2024 to Record Low*, REUTERS (Jan. 28, 2025, at 10:35 ET), https://www.reuters.com/world/us/us-labor-union-membership-little-changed-2024-government-says-2025-01-28/.

42. *See Labor Unions*, GALLUP, https://news.gallup.com/poll/12751/labor-unions.aspx [https://perma.cc/BAN4-YRTC] (last visited Jan. 25, 2026).

43. *See infra* Parts III–IV.

44. Kenneth R. Swift, *The Public Policy Exception to Employment at-Will: Time to Retire a Noble Warrior?*, 61 MERCER L. REV. 551, 555 (2010); 42 U.S.C. § 2000e-2.

45. 29 U.S.C. § 623.

46. 42 U.S.C. § 12112.

47. 5 U.S.C. § 2302(b)(8); *see infra* Part III.

48. *See* Michael A. Katz, *Still Crazy After All These Years: The Employment at-Will Doctrine and Public Policy Exceptions*, 10 ATL. L.J. 1, 22 (2007).

49. *See* Corbett, *supra* note 28, at 84, 95.

50. *See* Julia Barnhart, *The Implied-in-Fact Contract Exception to at-Will Employment: A Call for Reform*, 45 UCLA L. REV. 817, 821, 825 n.42 (1998).

have limited it to the point where proving an implied-in-fact contract is nearly impossible for the average employee.[51] The reasons for the doctrine's decline are multifaceted, but it may have come down to the fact that employers became aware that they were losing court battles due to loose wording in places like employee manuals. In short, they became better at drafting.[52] Once the drafting improved, it became easier for courts to retreat into formalism and to avoid finding promises that were not explicitly contained in the text of the contracts.[53] Additionally, most employers know to put large and obvious disclaimers letting the employees and the courts know that the employment relationship is intended to be at-will.[54] Courts in a few states have also allowed employees to recover under the hybrid theory of the covenant of good faith and fair dealing.[55] This remedy, however, is often limited to employees who have worked at a business for a long time, often many years, or are denied a benefit they reasonably expected would accrue to them,[56] such as a guaranteed sales bonus that is denied to them because they were discharged.

These theories have allowed some workers to recover damages for their discharge, but on balance they can safely be considered failures. On the other hand, by far the most popular, the most significant, and the most controversial exception is the tort theory of wrongful discharge in violation of public policy.

II. THE PUBLIC POLICY EXCEPTION

Part II first traces the origins and elements of the public policy exception, then explains how courts have narrowed the doctrine—often to the detriment of whistleblowers—before concluding with examples that illustrate those limitations.

A. ORIGINS AND ELEMENTS OF THE TORT

A wrongful-discharge claim based on public policy arises when an employer terminates an employee for refusing to engage in conduct the state has expressly or implicitly deemed harmful to the public.[57] The origin of the public policy exception is usually traced to the California case, *Petermann v. International Brotherhood of Teamsters*.[58] The plaintiff in *Petermann*, an employee of the International Brotherhood of Teamsters union, was called to testify in front of the California state legislature.[59] Prior to his testimony, the Teamsters ordered him to make false statements to the committee.[60] When the plaintiff refused, the

51. *See* Corbett, *supra* note 28, at 93–95.
52. Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 379 (2008).
53. *Id.* at 378–79.
54. *See id.* at 379.
55. Corbett, *supra* note 28, at 84, 90.
56. *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1935–36 (1983) [hereinafter *Protecting Employees*].
57. *See* Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).
58. 344 P.2d 25 (Cal. Ct. App. 1959); Corbett, *supra* note 28, at 97.
59. *Petermann*, 344 P.2d at 26.
60. *Id.*

Teamsters fired him.[61] The court acknowledged the difficulty in ascertaining what the "public policy" of the state is but found that, because lying to the legislature is a crime, it followed that firing an employee because they refused to commit the crime of perjury is against the public policy of the state of California.[62] Widespread acceptance of the public policy exception did not immediately follow the *Petermann* decision, but by the 1980s, it became a mainstay in employment litigation.[63]

1. Majority Formulation

Although the precise elements of the public policy exception vary depending on the jurisdiction,[64] there are two basic formulations of the tort, a restrictive majority approach and a broader minority approach. Plaintiffs attempting to recover in a jurisdiction that has adopted the majority test must demonstrate that their discharge contravenes a well-defined public policy of the state and that the facts of their claim fall within one of four recognized categories.[65] The four recognized categories are (1) refusing to commit an unlawful act, (2) performing an important public obligation, (3) exercising a statutory right, and (4) whistleblowing.[66]

2. Minority Formulation

In response to the restrictive nature of the traditional approach, a small minority of states have opted for a more flexible test.[67] This test, formulated by Henry Perritt Jr. in 1991, does away with the pigeonholing of the majority test. It instead sets out four elements that a plaintiff must satisfy to prevail under the public policy exception:

> (1) The clarity element: the plaintiffs must prove the existence of a clear public policy;
>
> (2) The jeopardy element: the plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy;
>
> (3) The causation element: the plaintiffs must prove that the public-policy-linked conduct caused the dismissal; and
>
> (4) The absence of justification element: the defendant must not be able to offer an overriding justification for the dismissal.[68]

---

61. *Id.*
62. *Id.* at 27.
63. *See* Corbett, *supra* note 28, at 98.
64. For example, in Texas, a plaintiff can only recover if they are fired for refusing to commit an unlawful act. Brunner v. Al Attar, 786 S.W.2d 784, 785 (Tex. App. 1990).
65. *See Protecting Employees*, *supra* note 56, at 1936–37; Gardner v. Loomis Armored Inc., 913 P.2d 377, 379 (Wash. 1996).
66. *See Gardner*, 913 P.2d at 379.
67. For example, West Virginia, Ohio, and Washington have adopted it. *See, e.g.*, Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713, 750 (W. Va. 2001); Dohme v. Eurand Am., Inc., 956 N.E.2d 825, 829 (Ohio 2011); *Gardner*, 913 P.2d at 382.
68. *Gardner*, 913 P.2d at 382.

Regardless of which test a court adopts, the elements of each test make clear that courts must determine whether there exists a clear public policy. Courts have frequently discussed the difficulty in determining the existence of any specific public policy.[69] Not only is it difficult for courts to ascertain what a state's public policy is but courts also struggle in deciding what sources may be consulted in making this determination. For example, some jurisdictions limit the sources of public policy to legislative pronouncements, whereas other courts take a broader approach and allow federal regulations, state court precedent, and codes of professional ethics to be used as sources.[70]

B. JUDICIAL NARROWING OF PUBLIC POLICY PROTECTIONS

Although the doctrine of the public policy exception might give the impression that it serves as a powerful tool to protect employees and society alike from the socially injurious conduct of employers, the scope of the tort has been narrowed to a significant extent through court precedent. In *Green v. Bryant*, a particularly egregious example of this problem, the district court found that it was not against the public policy of Pennsylvania for an employer to discharge an employee because she was beaten with a pipe and then raped at gunpoint by her ex-husband.[71] The court ignored any possible repercussions this holding might have on domestic violence victims. For example, if a domestic violence victim knows that they can lose their employment, and therefore their livelihood, simply for being a victim, this may make them less likely to come forward.[72] Given that financial control is one of the central ways that abusers can ensure their victims are unable to leave,[73] there is a strong argument that leaving victims unprotected from discharge undermines the public policy of most states. Ignoring all this, the *Green* court instead looked at the statutes the plaintiff cited in her favor, found that none of them were directly related to the employment relationship, and ruled against her.[74] Unsurprisingly, Pennsylvania uses the majority approach.[75]

The rationale behind courts defining public policy narrowly is twofold. First, courts are afraid of legislating from the bench, particularly when it comes to a doctrine such as employment-at-will that has strong historical and ideological

69. *See, e.g.*, Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878–79 (Ill. 1981).

70. *See Brunner*, 786 S.W.2d at 785; *Palmateer*, 421 N.E.2d at 878; GTE Prods. Corp. v. Stewart, 653 N.E.2d 161, 165 (Mass. 1995).

71. 887 F. Supp. 798, 800–01 (E.D. Pa. 1995).

72. The case of *Danny v. Laidlaw Transit Services, Inc.* will be discussed in some depth in Part V, but the court in that case makes this exact point that punishing victims for experiencing domestic violence will make them less likely to cooperate with the state in investigations surrounding their abuse. *See* 193 P.3d 128, 133 (Wash. 2008) (en banc); *infra* Section V.B.

73. *See* Judy L. Postmus, Sara-Beth Plummer, Sarah McMahon, N. Shaanta Murshid & Mi Sung Kim, *Understanding Economic Abuse in the Lives of Survivors,* 27 J. INTERPERSONAL VIOLENCE 411 (2012).

74. *Green*, 887 F. Supp. at 801.

75. *See id.* at 800–01.

justifications supporting it.[76] The public policy exception contains an inherently unstable quality. If anything can be public policy, so the argument goes, then courts could in effect judicially and undemocratically destroy the at-will presumption. Indeed, many commentators in the late twentieth and early twenty-first centuries treated the prospect that the public policy exception would eradicate the at-will presumption not as a distant possibility but rather as a near certainty.[77] With the benefit of hindsight, these fears (or hopes) appear somewhat divorced from reality. But the fact that so many labor and employment law scholars and practitioners seriously believed that the public policy exception might destroy the at-will presumption demonstrates its radical doctrinal potential.[78]

The second reason why courts often construe public policy narrowly is because they need to strike the correct balance between the often-divergent interests present in any case involving the public policy exception: the employee clearly has a strong interest in a job, the public has an interest in having its laws and policies protected, and the employer has an interest in running its business in a profitable way.[79] The Maryland Court of Appeals gave a strong summation of this rationale in *Adler v. American Standard Corp*.[80] First, the court admitted that when an employee loses their job, they are "suddenly faced with an uncertain job future" and they may not be able to meet "continuing economic obligations."[81] Next, the court raises the interests of the employer, to be able to discharge "whenever it would be beneficial to his business."[82] Finally, the court writes that "society as a whole has an interest in ensuring that its laws and important public policies are not contravened."[83] The obvious problem is that courts have little guidance in how to weigh these different interests. Because the test requires courts to balance these interests without clear standards, it often enables courts to place disproportionate weight on the employer's interest in managerial discretion, thereby narrowing the potential scope of the tort and undervaluing the social cost of unaddressed employer misconduct.[84]

Both reasons for courts' conservative approach to the exception emerge in the case *Jarrell v. Frontier West Virginia, Inc*.[85] The facts of *Jarrell* are straightforward.

76. *See* Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583, 1618 (1994) ("The majority in *Geary*, however, supported a narrow use of the exception, preferring to let the legislature speak for the public and to limit legislation from the bench.").

77. *See* Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 687 (2000); Epstein, *supra* note 36, at 947–53.

78. *See* Katherine L. Williams, *The Defendant's Perspective:* Hausman *Further Guts Wisconsin's Employment-at-Will Doctrine*, WIS. LAW., July 2000, at 21, 60 (arguing that a court decision had "clearly opened the door to a further evisceration of employment-at-will").

79. Callahan, *supra* note 22, at 491 & n.49.

80. 432 A.2d 464 (Md. 1981).

81. *Id.* at 470.

82. *Id.*

83. *Id.*

84. The judiciary has faced substantial critique in recent years for its open and obvious pro-business slant. *See* Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox,* 135 HARV. L. REV. 220, 223 (2021).

85. 895 S.E.2d 190 (W. Va. 2023).

For eight years, Todd Jarrell served as a cable technician with Frontier West Virginia, a telecommunications company.[86] While working for Frontier, he learned that some of his coworkers were intentionally sabotaging Frontier's communication lines to get themselves assigned overtime work to fix the very infrastructure they had tampered with.[87] Jarrell reported his coworkers' conduct to his supervisor, who, upon receiving Jarrell's report, told him that the employees who were sabotaging the communication lines were "untouchable" because they had "friends in high places."[88] Jarrell then directly contacted upper management.[89] Within a year of blowing the whistle on the misconduct of his coworkers, Frontier fired Jarrell.[90]

Three features of Jarrell's case suggested that he had a particularly strong claim under the public policy exception. First, Jarrell reported misconduct of his coworkers, so he was whistleblowing, which is often protected under the public policy exception. Second, Jarrell alleged that someone had died because the communication lines were down during a medical emergency, so Jarrell was able to point to a specific fact that demonstrated the health and safety of the public was harmed by the conduct of his coworkers.[91] Third, and perhaps most persuasive for Jarrell's claim, a West Virginia statute criminalizes the conduct of his coworkers, stating that "[a]ny person who causes a disruption of communications services or public utility services . . . by intentionally damaging communications or public utility equipment" will be criminally sanctioned.[92]

In siding with Frontier, the court emphasized its reluctance to legislate from the bench, reasoning that nothing in the statute criminalizing the destruction of communication lines signaled a legislative intent to announce a substantial public policy; rather, the statute simply recognized a "property crime."[93] The court treated the statute as protecting property, not as protecting the public, and because the statute's purpose is not to protect the public, it followed that it could not set forth substantial public policy.[94] This conclusion followed even though someone allegedly died because of the sabotaged communication lines.

The court also demonstrated an overvaluation of the employer's interest by finding that the statute did not sufficiently put employers on notice that it embodied a public policy of the state.[95] The court quoted *Birthisel v. Tri-Cities Health Services Corp.*, stating: "An employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations."[96] Here, faced with the

86. *Id.* at 192.
87. *Id.* at 193.
88. *Id.* at 201 (Hutchison, J., dissenting).
89. *Id.*
90. *See id.* at 194 (majority opinion).
91. *Id.* at 193.
92. *Id.*; W. VA. CODE § 61-3-49b.
93. *See Jarrell*, 895 S.E.2d at 198.
94. *See id.*
95. *Id.* at 198–99.
96. *Id.* at 199 (quoting Birthisel v. Tri-Cities Health Servs. Corp., 424 S.E.2d 606, 612 (W. Va. 1992)).

interests of the public in sabotage-free communications and the interests of Jarrell in keeping his job, the court sided with Frontier, evincing concern that Frontier might somehow be caught off guard if the statute criminalizing the conduct of Frontier's employees were to be a source of public policy.

Jarrell is a good example of the lengths to which courts often go to frustrate plaintiffs' claims for redress generally, and whistleblowers specifically, under the public policy exception. Even though there was a statute criminalizing the conduct of Jarrell's coworkers and even though someone allegedly died because of that conduct, the court found that it would be unfair to the employer because the public policy is not sufficiently clear. If courts treat clearly criminal conduct this way, it is difficult to see how employees raising health or safety concerns about conduct that skirts the line of legality or is entirely lawful could hope for protection.[97]

III. FEDERAL WHISTLEBLOWER PROTECTIONS

This Part begins by briefly charting the growth of federal whistleblower laws to help situate the reader before then discussing the limitations of those statutes.

A. HISTORICAL DEVELOPMENT OF FEDERAL WHISTLEBLOWER LAWS

In light of the limitations of the public policy exception, it is useful to consider whether federal statutes offer more robust protections. The history of federal whistleblower laws can be traced back to the Civil War following the passage of the False Claims Act of 1863.[98] However, the real explosion of whistleblower protections occurred during the 1960s and 1970s when several statutes were passed protecting whistleblowers,[99] sometimes through ancillary provisions.[100] There now exists a wide range of federal whistleblower laws. These laws vary significantly in scope, as well as what steps a whistleblower must take to fall under the statute's protections.[101] Some statutes give financial compensation to

---

97. Although *Jarrell* is particularly egregious, there are many other cases involving internal whistleblowers that come to similar conclusions for similar reasons. *See, e.g.*, Margiotta v. Christian Hosp. Ne. Nw., 315 S.W.3d 342, 344, 346 (Mo. 2010) (en banc) (holding that a regulation was too vague to support a finding of public policy); Parks v. Alpharma, Inc., 25 A.3d 200, 215 (Md. 2011) (holding that various federal statutes did not protect plaintiff's internal whistleblowing because they were "too vague"); Boynton v. ClearChoiceMD, MSO, LLC, 216 A.3d 1243, 1245, 1248 (Vt. 2019) (holding that an internal whistleblower who reported a doctor's violent remark about a mentally ill patient was not protected by the public policy exception because the professional guidelines relied upon by the plaintiff did not present a clear enough public policy).

98. Julie Jones, *Give A Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-at-Will Doctrine*, 34 TEX. TECH. L. REV. 1133, 1140 (2003).

99. *See id.* at 1140–41.

100. For example, the Occupational Safety and Health Act (OSH Act), which was enacted in 1970 and created the Occupational Safety and Health Administration, is primarily concerned with providing substantive protections for employees in the workplace. *See* 29 U.S.C. § 651. However, in addition to the substantive protections the OSH Act provides for employees, it also contains a provision protecting employees who blow the whistle regarding unsafe workplace practices. *See* 29 U.S.C. § 660. In this sense, the whistleblowing provision is "ancillary" to the statute.

101. *See* Jones, *supra* note 98, at 1140–41; Gerard Sinzdak, Comment, *An Analysis of Current Whistleblower Laws: Defending A More Flexible Approach to Reporting Requirements*, 96 CALIF.

whistleblowers, while others merely protect the employee from discharge.[102] Additionally, the kinds of employees protected differ based on the statute. For example, the Whistleblower Protection Act of 1989 (WPA) protects only public sector employees,[103] whereas the whistleblower protections contained within the Occupational Safety and Health Act (OSH Act) protect both public and private sector whistleblowers.[104]

B. LIMITS OF FEDERAL STATUTORY PROTECTION

The problem for most whistleblowers is that federal statutes are quite limited in who they reach. Although the WPA offers the broadest protections against discharge or discipline for whistleblowers, its reach is limited to employees in the public sector.[105] Most other statutes are more limited and only protect whistleblowers from discharge for reporting a narrow range of law-breaking activities.[106] Therefore, private sector whistleblowers, unlike their public sector counterparts, will not be protected by federal statutes. The seemingly obvious way to fix deficient whistleblower protections then is through Congress passing a law that gives more protection to whistleblowers. But given the era of partisan gridlock and the general difficulty in passing worker-friendly legislation,[107] it is unlikely that any pro-whistleblower statute will be enacted. Therefore, given the weakness of existing federal statutes and the remote chance of new, more protective legislation, potential whistleblowers will have to look beyond federal law for protection. As the next Part shows, however, state laws suffer from their own limitations.

IV. STATE WHISTLEBLOWER PROTECTIONS

Part IV begins with the limitations of state whistleblower statutes, which fail to pick up the slack of their federal counterparts. Then, it will discuss a small minority of state statutes that demonstrate a superior approach, although the likelihood of their approach spreading to other states is low.

A. COMMON LIMITATIONS IN STATE STATUTES

Since federal protection is limited, many whistleblowers may turn to state law to protect themselves. It is difficult to generalize state whistleblower statutes because protections differ substantially from state to state. On balance, though, state whistleblower laws improve on the federal statutory regime by providing

---

L. REV. 1633, 1638–41 (2008); *see also* Cavico, *supra* note 27, at 576 (comparing the scope of various state whistleblower statutes and the whistleblower provision of the Sarbanes-Oxley Act of 2002).

102. *See* Jones, *supra* note 98, at 1140; Cavico, *supra* note 27, at 580.

103. Jones, *supra* note 98, at 1141.

104. *See* 29 U.S.C. §§ 652, 660.

105. Sinzdak, *supra* note 101, at 1640.

106. *Id.* at 1639–40.

107. *See* Barry Eidlin, *To Pass the PRO Act, We Need to Examine Past Labor Law Reform Failures*, JACOBIN (June 24, 2021) https://jacobin.com/2021/06/pro-act-collective-bargaining-labor-law-legislation [https://perma.cc/9NFC-ABRC].

more comprehensive protection and covering more workers.[108] Still, there are varying problems with these state statutes.

First, just like the Whistleblower Protection Act of 1989 (WPA), many state statutes apply only to public sector employees, which leaves the bulk of American workers, who labor in the private sector, unprotected.[109] Second, a mistake in where a whistleblower files a complaint can turn an otherwise protected report into unprotected activity that can lead to the whistleblower's discharge. Many state whistleblower statutes require a whistleblower to first report to a supervisor in-house so that the supervisor can attempt to remedy the situation before the government gets involved.[110] Other statutes require whistleblowers to first file reports to the government.[111] This variation can make it challenging for legally unsophisticated whistleblowers, many of whom lack legal counsel, to gain protection from the law.

Another major limitation is that, in most states, whistleblowers are protected only if they report illegal conduct or reasonably believe the conduct to be illegal.[112] California, a state with otherwise more robust whistleblower protections than most,[113] will only protect a whistleblowing employee "if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation."[114] As the statute makes clear, a violation of law, rule, or regulation or reasonable belief in such a violation must be present. If an employee reports a practice of their employer that may not be illegal but is still injurious to society, like the plaintiffs in *Coward* and *Blackburn* who reported suicide-enabling understaffing and outrageously negligent medical conduct, respectively, there will be no protection.[115] The exception to the illegality requirement is that some states possess subject-matter-specific whistleblower laws that protect more than just disclosures of violations of law.[116] There are some whistleblower protections in the healthcare sector that lack the illegality requirement. For example, California has a statute that gives healthcare workers the right to report any issue relating to patient safety to their superiors, while being protected from discharge for doing so, even if their complaint does not allege illegality.[117] The statute protects any employee who "[p]resented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity."[118]

---

108. *See* Sinzdak, *supra* note 101, at 1638, 1640–42; *see, e.g.*, CAL. LAB. CODE § 1102.5.
109. *See* Jones, *supra* note 98, at 1141–42; *see, e.g.*, GA. CODE ANN. § 45-1-4.
110. Sinzdak, *supra* note 101, at 1654.
111. *Id.* at 1651.
112. Cavico, *supra* note 27, at 569–70.
113. *See id.* at 549–50.
114. CAL. LAB. CODE § 1102.5(b).
115. *See supra* notes 1–16 and accompanying text.
116. *See* Vaughn, *supra* note 18, at 592–93.
117. CAL. HEALTH & SAFETY CODE § 1278.5(a)–(b).
118. *Id.* § 1278.5(b)(1)(A).

B. NOTABLE BROADER APPROACHES

A small minority of states have adopted broader, more protective approaches that offer a useful contrast to the prevailing model. These states are Maine,[119] New York,[120] and Colorado.[121] New York's whistleblower statute, for example, provides protection to any employee who "discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation *or that the employee reasonably believes poses a substantial and specific danger to the public health or safety*."[122] This language stands in stark contrast to most other state whistleblower statutes because there need not be an actual violation of law for the statute to provide protection. Maine's whistleblower statute is even broader, dropping the "substantial and specific danger" language contained in New York's statute and instead stating that an employee who reports in good faith "a condition or practice that would put at risk the health or safety of that employee or any other individual" will be protected.[123] On the other hand, Colorado's statute is the most limited of the bunch, and in fact may not be a general purpose whistleblower statute at all, because the language of the statute limits the coverage to workplace dangers.[124] The Colorado legislature passed the law with the workplace dangers of COVID-19 in mind.[125] Still, it is possible that the Colorado courts could interpret this statute more broadly. For example, the statute's language could allow for a court to rule in favor of protection for a whistleblower who is uncomfortable with the safety of a product that is created in the workplace even though that would not necessarily be a workplace safety issue. Because the statute is so recent, the Colorado Supreme Court has not yet interpreted it, and lower courts have expressly deferred doing so pending guidance from the state's highest court.[126]

Although there is not yet significant caselaw interpreting New York's amended whistleblower statute, the case of *Owens v. Delta Airlines, Inc.*[127] gave a lenient reading on what constitutes a substantial and specific danger to the public sufficient for whistleblower protections to attach. In *Owens*, the plaintiff had an allergic reaction to a new uniform that Delta mandated flight attendants to wear.[128] She alerted her supervisors of this numerous times and was eventually fired.[129] One of her claims was for wrongful discharge under New York's newly amended

119. ME. STAT. tit. 26, § 833.
120. N.Y. LAB. LAW § 740.
121. COLO. REV. STAT. § 8-14.4-102.
122. N.Y. LAB. LAW § 740(2)(a) (emphasis added).
123. ME. STAT. tit. 26, § 833(1)(B).
124. COLO. REV. STAT. § 8-14.4-102(1).
125. *See* H.B. 20-1415, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020). The experience of COVID-19 in the workplace speaks to how urgent increased protections for workers reporting health and safety concerns is.
126. Schlagel v. Disc. Tire Co. of Colo., Inc., No. 23-cv-02909, 2025 WL 316549, at *13 (D. Colo. Jan. 28, 2025).
127. No. 23-CV-02114, 2025 WL 278024 (E.D.N.Y. Jan. 23, 2025).
128. *Id.* at *2.
129. *Id.* at *2–4.

whistleblower statute.[130] Delta argued that she had not raised concerns that others were experiencing problems associated with the uniform and therefore Owens failed to allege any substantial and specific danger to public health or safety.[131]

On summary judgment, the court found this unpersuasive and instead opted for a broad reading of the amended statute. The court stated that Owens's communications could "reasonably evidence that belief, especially given that Delta knew the Plum uniform caused adverse reactions in many flight attendants."[132] The court finished by stating that New York Labor Law Section 740 allows for claims to proceed even when only one individual would be harmed, and in this case, the adverse reaction of the flight attendants could conceivably harm the flyers as well.[133]

This claim would not survive summary judgment in almost any other state because Owens did not claim that Delta was breaking any laws. A lack of illegal conduct by a whistleblower's employer, regardless of the potential harm of the employer's actions, would lead to the claim being dismissed at the summary judgment stage under almost every other state whistleblower statute.

Given the broad protections conferred by the whistleblower laws of Maine, New York, and Colorado, one possible solution to the problem of inadequate whistleblower protections is to simply strengthen state whistleblower protections. The problem of course is that most states are relatively hostile to worker protections.[134] This hostility is amplified when the protections in question limit the employer's prerogative to fire employees whenever they so choose.[135] Similar to federal law, the likelihood that states will pass broad whistleblower statutes protecting employees who report non-illegal misconduct is low. For that reason, it is necessary to turn back to the common law, which remains one of the few mechanisms capable of filling in the gap.

V. THE *GARDNER* AND *DANNY* APPROACH TO THE PUBLIC POLICY EXCEPTION

Part V discusses two cases, *Gardner v. Loomis Armored Inc.* and *Danny v. Laidlaw Transit Services, Inc.* These cases give rise to a new potential for the public policy exception as it pertains to health-related whistleblowers.

130. *Id.* at *12.

131. *See id.*

132. *Id.*

133. *Id.*

134. Labor unions have recently begun to regain popularity, and as a result, many states have pushed back and attempted to nip this resurgent labor movement in the bud. *See* Casey Quinlan, *States Are Pushing Back with Anti-Labor Laws as Union Popularity Grows, Policy Experts Say*, MO. INDEP. (Sep. 11, 2024, at 09:00 ET), https://missouriindependent.com/2024/09/11/states-are-pushing-back-with-anti-labor-laws-as-union-popularity-grows-policy-experts-say/.

135. For example, in response to the Arizona Supreme Court ruling against an employer for wrongful discharge in violation of public policy, the Arizona legislature enacted the Arizona Employment Protection Act, explicitly enshrining the at-will presumption. *See* ARIZ. REV. STAT. ANN. § 23-1501(2); Marzetta Jones, Note, *The 1996 Arizona Employment Protection Act: A Return to the Employment-at-Will Doctrine*, 39 ARIZ. L. REV. 1139, 1139–40 (1997).

A. *GARDNER V. LOOMIS*: EXPANDING PUBLIC POLICY TO PROTECT PUBLIC SAFETY ACTS

As Parts I through IV demonstrate, the existing whistleblower protections remain inadequate and require reconsideration. And although there are certain state statutes that rectify these inadequacies, it is important that we find a solution that will reach all workers and will not leave workers in states with weaker statutory protections vulnerable.

There is a good deal of precedent in state courts, notwithstanding the assault on the doctrine in recent decades, for a broad reading of the *clarity* element of the public policy exception. *Gardner v. Loomis Armored Inc.* is one such case. If courts instead follow the lead of *Gardner*, there is a possibility that the tort can again be used to protect workers from the harshest outcomes of employment-at-will, while also safeguarding the public's interest in living in a healthy and safe society. This is because a central problem for plaintiffs is overcoming how narrowly courts identify public policy, meaning that the tort cannot often protect whistleblowers reporting non-illegal health- and safety-related concerns. Although *Gardner* does not address the typical whistleblower situation that this Note focuses on, the reasoning that the Washington Supreme Court uses to satisfy the *clarity* element of the public policy exception can be used just as effectively for protecting whistleblowers.

In *Gardner*, the facts are exceptional. The plaintiff had been working for Loomis as an armored truck driver.[136] He and his coworker were making a scheduled stop at Seafirst Bank in Spokane when he noticed a woman he recognized as the bank manager running out of the bank; close behind her was a man chasing her with a knife.[137] The woman made it to safety, but the knife-wielding man had grabbed another woman and was holding her hostage with the knife at her throat.[138] Gardner heroically left the armored truck, and with the help of another bystander, tackled the man and disarmed the man; police arrived at the scene immediately and took him into custody.[139] For this act of courage, Loomis Armored Trucks fired Gardner.[140]

The employer's rationale for firing Gardner, unlike the employer's rationale in many other wrongful discharge cases, was based on sound company policy instead of caprice or vindictiveness. Robbers commonly attempt to lure both drivers out of armored trucks to gain access to the valuables inside.[141] Partly for that reason, Loomis had a policy dictating that under no circumstances should both drivers ever leave the truck while it contains valuables.[142] So strong was this policy that Loomis truck drivers were not allowed to leave their truck even for police officers and instead had to follow the police to the station.[143] Gardner obviously broke this rule when he jumped out of the truck to save the woman's life.

136. Gardner v. Loomis Armored Inc., 913 P.2d 377, 378 (Wash. 1996).
137. *Id.*
138. *Id.* at 379.
139. *Id.*
140. *Id.*
141. *Id.* at 385.
142. *Id.*
143. *Id.* at 379.

These facts put the court in a difficult position. First, Loomis's policy served a legitimate safety and security interest of the employer, and as previously explicated, courts often weigh the interests of the employer quite heavily. Second was the challenge in finding a public policy that was clearly established by state statutory law or state or federal constitutional law. Because this fact pattern was so exceptional, there was no chance the court would find an explicit legislative pronouncement covering this type of situation. In other words, both rationales for the narrow way that courts have applied the *clarity* element of the public policy exception were present in this case: a strong managerial interest in running an enterprise in the way identified as most profitable for the company, and the court's fear of legislating from the bench.

The question certified to the court asked, "Does it violate public policy in the State of Washington to discharge an at-will employee for violating a company rule in order to go to the assistance of a citizen held hostage at the scene of a crime, and/or who is in danger of serious physical injury and/or death?"[144] Despite difficulties, the court answered in the affirmative. In finding that there was a public policy against Gardner's discharge, the court creatively applied statutes, common law, and constitutional law and found that, put together, these varying sources evinced a clear public policy.[145]

The court, through creative use of statutory law, common law, and constitutional law, found a clear public policy that protected the plaintiff from discharge: a public policy protecting human life.[146] In coming to this conclusion, the court took a more creative approach than is usual for courts applying the public policy exception. First, the court noted that under the doctrine of exigent circumstances, Fourth Amendment protections yield when human life is in imminent danger, reflecting the law's prioritization of life over even sacred constitutional protections.[147] The court then pointed to the fact that even criminal liability is negated in cases where human life is endangered. For example, the use of deadly force for legitimate self-defense is a complete defense to criminal liability.[148] Even homicide is excused if it is done in defense of one's life. In proving this point, the court used both common law precedent and state statutes.[149] The combination of these two points—the waiver of traditional constitutional protections when life is endangered and the absence of criminal liability when deadly force is used in self-defense—was enough for the court to find that there exists a public policy protecting human life.

B. *DANNY V. LAIDLAW*: EXPANDING *GARDNER*'S PRINCIPLE

Gardner is not unique in its willingness to creatively ascertain public policy by relying on sources that might initially seem peripheral to the specific facts or to hold that protecting human life is an important public policy. In *Danny*

144. *Id.*
145. *Id.* at 379–84.
146. *Id.* at 383.
147. *Id.* at 383–84.
148. *Id.* at 384.
149. *Id.*

v. Laidlaw Transit Services, *Inc.*, the court was faced with a difficult case involving domestic violence. The plaintiff and her five children had been abused at the hands of her husband.[150] Following a beating that left her son hospitalized, the plaintiff ran away with her five children.[151] She then requested time off from her employer, Laidlaw Transit Services, to make the transition to a shelter for domestic violence victims.[152] This time off was granted, but then, a few months later, Laidlaw fired Danny.[153]

Again, like in *Gardner*, both rationales for the narrow construction of the public policy exception were present. Danny's ability to perform her job had been compromised by the abuse she was enduring, giving her employer a facially legitimate business reason to terminate her. Furthermore, just like in *Gardner*, there was no legislative pronouncement stating that an employer cannot fire victims of domestic abuse, meaning that the court might feel itself to be legislating from the bench. The situation was reminiscent of *Green v. Bryant*, where the court found that the plaintiff did not qualify for the public policy exception when she was fired because her ex-husband raped her at gunpoint.[154] Unlike in *Green*, however, the *Danny* court ruled in favor of the plaintiff on the question of *clarity*.[155]

In ruling for the plaintiff, the court found that it was the public policy in Washington to prevent domestic violence.[156] The court used a wealth of statutes, executive pronouncements, and judicial decisions to demonstrate the importance to the state of preventing domestic violence. For example, the court cited to section 10.99.030 of the Revised Code of Washington, which mandates police officers to make arrests when there is probable cause that domestic violence occurred.[157] For the court, the statute's mandatory-arrest requirement showed the legislature's strong commitment to protecting victims and treating domestic violence as a matter of urgent public concern.[158] That commitment was sufficiently clear to supply the public policy needed for the *clarity* element.

Arguably most important for the internal whistleblower who reports on public health and safety concerns, the court expanded *Gardner*'s holding that protecting human life is a clearly pronounced public policy. In *Gardner*, the harm was immediate—the employee either had to act or allow a woman to die.[159] In *Danny*, while the plaintiff's domestic situation was clearly horrid, there was no immediate risk of bodily harm. Still, the court felt that *Gardner* was controlling.[160] It said that *Gardner*'s holding "provides further evidence that this court has endorsed

150. Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 130 (Wash. 2008) (en banc).
151. *Id.*
152. *Id.* at 130–31.
153. *Id.*
154. 887 F. Supp. 798, 800 (E.D. Pa. 1995).
155. *See Danny*, 193 P.3d at 132.
156. *Id.* at 138.
157. *Id.* at 132; WASH. REV. CODE § 10.99.030(2)(a).
158. *Danny*, 193 P.3d at 132.
159. *See supra* notes 136–45 and accompanying text.
160. *See Danny*, 193 P.3d at 137.

the protection of human life."[161] Many of the harms workers face in their workplaces are not immediate, and through the expansion of the *Gardner* holding, the court opened the path to broader worker protections.

Danny is important for two reasons. First, the *Danny* court adopted *Gardner*'s willingness to read legislative pronouncements holistically, using statutes that may seem distant from the employment context to illuminate the state's broader public policy commitments. The court used a statute necessitating the immediate arrest of a domestic violence perpetrator if probable cause exists as evidence that an employer cannot fire their employee for taking time off work to deal with the ramifications of domestic violence. This is precisely the interpretive power courts constantly use, the only difference being that the *Danny* court used this power to aid the powerless in society rather than the powerful. Second, *Danny* expanded *Gardner*'s basic holding: that protecting human life is a sufficiently clear public policy to satisfy the *clarity* element of the public policy exception.

In conclusion, *Gardner* and *Danny* are very similar. Both cases assemble multiple, sometimes indirect, sources of law, read those sources capaciously, and treat protection of human life as a sufficiently clear public policy. Together, these cases demonstrate that courts already possess the doctrinal capacity to protect disclosures of serious health and safety risks—an approach the next Part formalizes into a workable test.

VI. A BETTER APPROACH TO PUBLIC HEALTH AND SAFETY WHISTLEBLOWING

Part VI begins by describing a new test based on the principles elucidated by *Gardner* and *Danny*. Then, this new test will be explicitly applied to *Coward* and *Jarrell* to demonstrate how those cases may have turned out if those plaintiffs had the protection of this new test.

A. EXTENDING THE PUBLIC POLICY TORT TO INTERNAL HEALTH AND SAFETY WHISTLEBLOWERS

Gardner and *Danny* take a more creative, yet still common-sense approach to the public policy exception. The contrast between *Gardner* and *Danny* on the one hand and *Jarrell* on the other is striking. In *Jarrell*, despite the existence of a statute explicitly criminalizing the conduct of Jarrell's coworkers—and allegations that this conduct had resulted in someone's death—the court did not find any protection from discharge for the plaintiff.[162] In *Gardner* and *Danny*, however, even in the absence of a directly relevant statute, the court inferred public policy by creatively drawing from a range of sources, ultimately protecting an employee from discharge who had acted in the public interest. Although detractors might argue that this is legislating from the bench, the reality is that the courts in *Gardner* and *Danny* were simply effectuating legislative policy by using all the pronouncements the legislature has given them, as opposed to selectively picking

161. *Id.* at 137.

162. *See supra* notes 85–97 and accompanying text.

and choosing in ways that usually seem to favor the employer's reading of the statute.

Because of the importance of internal whistleblowing to public health, *Gardner*'s holding, which *Danny* reaffirmed, that there exists a public policy protecting human life, could be applied whenever an internal whistleblower reports a possible policy or practice of the employer (or other employees) that the whistleblower reasonably believes could lead to damage or harm to public health. Although this conclusion is broad, it is well-supported by *Danny*, which held that the policy protecting human life prevented Danny's firing, even though there was no risk of her imminent death. By using the logic of *Gardner* and *Danny*, we can refashion a stronger approach to the public policy exception that gives universal protection to internal whistleblowers whose complaints allege possible harm to the public health, even in situations where the conduct that the whistleblower reports may not be illegal.

In cases involving an internal health- or safety-related whistleblower complaint, the first step of the minority approach, *clarity*, should presumptively be satisfied under *Gardner* and *Danny*. Using *Gardner*'s and *Danny*'s holdings, we can find virtual unanimity in every jurisdiction that protecting human life is an important public policy. Three independent sources of law support this conclusion. First, federally, there are entire agencies dedicated exclusively to protecting the health of the public. These agencies include the Environmental Protection Agency (EPA),[163] Occupational Safety and Health Administration (OSHA),[164] and Department of Health and Human Services (HHS).[165] Then, at the state level, every state has numerous statutes whose *raison d'être* is protecting public safety and health.[166] Finally, the arguments from *Gardner* itself carry substantial weight: the waiver of usual Fourth Amendment protections and the complete defense of self-defense to criminal liability proves that there is a widely recognized public policy of protecting human life. Therefore, protecting the health and safety of the public should be universally recognized as an important public policy, and the *clarity* element should automatically be satisfied when a whistleblower makes a report that implicates a danger to the public's health or safety.

Next, the *jeopardy* element of the minority test—the plaintiff must prove that discouraging the conduct they engaged in would jeopardize the public policy of protecting human life—should likewise be automatically satisfied in the case of an internal whistleblower disclosing risks to health and safety. Because

---

163. *Our Mission and What We Do*, U.S. EPA (Oct. 20, 2025), https://www.epa.gov/aboutepa/our-mission-and-what-we-do [https://perma.cc/L2D7-VECX] ("The mission of EPA is to protect human health and the environment.").

164. *About OSHA*, U.S. DEP'T LAB.: OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/aboutosha [https://perma.cc/PEC2-8DRK] (last visited Jan. 28, 2026) ("OSHA's mission is to assure America's workers have safe and healthful working conditions free from unlawful retaliation.").

165. *About HHS*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/about/index.html [https://perma.cc/W8YC-9WU9] (last visited Jan. 28, 2026) ("The mission of the U.S. Department of Health and Human Services (HHS) is to enhance the health and well-being of all Americans. . . .").

166. *See, e.g.*, IOWA CODE § 135.27; N.Y. PUB. HEALTH LAW § 2895; WYO. STAT. ANN. § 35-1-240; NEV. REV. STAT. § 268.524.

discouraging internal reporting by threatening termination would predictably undermine the public policy of protecting health and safety, the *jeopardy* element is inherently satisfied whenever an employee faces discharge for such reporting. Indeed, many employees cite fear of retaliation as a reason for not whistleblowing.[167] Given that we have established protecting human life as a public policy, any chilling of the employee's ability to bring concerns will therefore jeopardize the public policy of protecting the public's health. Furthermore, while protection of all health- and safety-related complaints, as opposed to simply those that immediately threaten human life, is broad, it is necessary not to jeopardize the important public policy of protecting human life. If those making complaints do not know they are protected, they will have to balance, on their own, the severity of the issue they are faced with. Many of those might decide not to make complaints, so their potentially advantageous whistleblowing activity will be chilled. For that reason, the broader reading of *Danny* and *Gardner*, that all health complaints should be protected, is necessary. At the same time, the remaining elements of the minority test—causation and the absence of overriding justification—should remain intact to maintain a workable balance between employee protections and legitimate managerial prerogatives.

B. A PROPOSED MODIFIED TEST

The new test for internal public health- or safety-related whistleblowers should be as follows:

(1) The plaintiff has reported to a supervisor a reasonable public health- or safety-related concern connected to the employer's business (the *health* element);

(2) The plaintiff must prove that their health- or safety-related whistleblowing caused the dismissal (the *causation* element); and

(3) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element).

Applying this new test to two previously mentioned cases, *Jarrell v. Frontier West Virginia* and *Coward v. MCG Health*,[168] we can see how this new test would better protect internal health-related whistleblowers. In *Jarrell*, the intentional sabotage of the company's communication lines plainly threatened public health, as Jarrell alleged that a person died when emergency responders could not be reached during a medical crisis.[169] Therefore, the first element of the test, the *health* element, would be satisfied. Given that the first element is satisfied, the

---

167. Geoff Schweller, *New Study Shines Light on Chilling Effect of Whistleblower Retaliation*, WHISTLEBLOWER NETWORK NEWS (May 21, 2024), https://whistleblowersblog.org/corporate-whistleblowers/new-study-shines-light-on-chilling-effect-of-whistleblower-retaliation/ [https://perma.cc/74SP-X4MY].

168. It must be noted again that Georgia is one of the few states that does not accept the public policy exception. *See* Fink v. Dodd, 649 S.E.2d 359, 362 & n.8 (Ga. Ct. App. 2007). However, the example would be applicable to any jurisdiction that does.

169. *See* Jarrell v. Frontier W. Va., Inc., 895 S.E.2d 190, 193 (W. Va. 2023).

remaining elements of *causation* and *absence of justification* would have to be applied. The court in *Jarrell* did not reach these questions because the court ruled against Jarrell on the first element of *clarity*.[170]

In *Coward*, the court applied Georgia's public sector whistleblower statute as opposed to the public policy exception because Georgia does not recognize the tort. However, we can see that if the court had used this test, Coward's conduct likely would have been protected. The first element is easily satisfied. Coward's complaint to her supervisor about understaffing is directly related to the health and safety of MCG's patients and therefore the public.[171] Like *Jarrell*, the second and third elements would have to be litigated because they are questions for the factfinder, but it is likely that Coward's claim would have made it to a jury, rather than being dismissed on summary judgment.

The nature of internal whistleblowing, as opposed to other common fact patterns under the public policy exception, justifies protecting all internal health and safety whistleblowers from discharge. In internal whistleblowing cases, courts will no longer have to strike a balance between the extremely disparate interests of the public and employers. While external whistleblowing can cost employers substantial amounts of money if the government decides to investigate, in the case of internal whistleblowing, the employer is subjected to no such investigation. Although the employer, when faced with an internal whistleblower complaint, may decide to use resources to investigate, that is by no means required.[172] Similarly, the public relations disasters associated with external whistleblowing when the government begins investigations are typically absent when dealing with internal whistleblowers.[173] When considering the interests of the public, however, the costs of leaving internal whistleblowers unprotected, which can often be tantamount to disallowing them from filing complaints, can be truly life-threatening, such as in *Coward* when, due to understaffing, a known suicidal patient was allowed to spend enough time alone to follow through on their ideations. Because the costs to the employer are minimal and the costs to society can be high, it stands to reason that the balance of interests leans heavily in favor of granting an internal whistleblower reporting on health- or safety-related concerns universal protections.

CONCLUSION

As the law currently stands, the employee who wants to bring health-related concerns to their employer without fear of retribution faces significant vulnerability under existing law. First, federal whistleblower law is narrow, only covering a

170. *See id.* at 198–99.

171. *See* Coward v. MCG Health, Inc., 802 S.E.2d 396, 398 (Ga. Ct. App. 2017).

172. *See Whistleblowers Should Avoid Internal Reporting Channels*, NAT'L WHISTLEBLOWER CTR., https://www.whistleblowers.org/internal-reporting-channels/ [https://perma.cc/NN65-S5F8] (last visited Jan. 28, 2026).

173. *See How Whistleblowers Changed the World*, NAT'L WHISTLEBLOWER CTR., https://www.whistleblowers.org/how-whistleblowers-changed-the-world/ [https://perma.cc/SF8W-ZWS3] (last visited Jan. 28, 2026).

select class of cases.[174] Next, although state whistleblower laws tend to cover a larger class of potential plaintiffs, the conduct that the whistleblower complains of typically must either be illegal or the whistleblower must have a reasonable belief in the conduct's illegality.[175] This means that for the nurse complaining about understaffing[176] or for the dental assistant reporting about an out-of-control dentist,[177] there will be no protection from discharge so long as there is no criminality. There are hopeful signs in a small minority of states that these whistleblower laws will be changed to encompass conduct that is not illegal.[178] But legislatures in many states are hostile to protecting workers, so this is an unlikely solution outside of the most liberal of state legislatures. Finally, courts have substantially limited the reach of the public policy exception, so if courts continue to approach the tort as they do now, it is unlikely that it will protect anything greater than what the inadequate state whistleblower statutes protect.

By applying the logic in *Gardner* and *Danny*, we can see that the public policy exception is perfectly amenable to a more generous approach. Given the critical importance of public health and safety, courts should extend the *Gardner* and *Danny* logic to all internal health- and safety-related whistleblowers.

174. Cavico, *supra* note 27, at 546.

175. *See, e.g.*, CAL. LAB. CODE § 1102.5(a)–(b).

176. *Coward*, 802 S.E.2d at 398.

177. Blackburn v. Am. Dental Ctrs., No. 10AP–958, 2011 WL 5825391, at *6 (Ohio Ct. App. Nov. 17, 2011).

178. *See* ME. STAT. tit. 26, § 833; N.Y. LAB. LAW § 740; COLO. REV. STAT. § 8-14.4-102.